

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

61081

FILE: B-185629

DATE: July 6, 1976

MATTER OF: Dollar Rent-A-Car Systems, Inc.

98344

## DIGEST:

1. When protest initially filed with agency is actively pursued, "initial adverse agency action" as contemplated by section 20.2(a) of GAO Bid Protest Procedures occurs upon receipt of agency's formal adverse decision, not, as contended, commencement of performance prior to formal decision.
2. Protest against SEB's failure to undertake further exploration of protester's proposal is without merit, since SEB identified the areas that needed clarification on two occasions prior to cutoff date for best and final offer.
3. Where record shows that evaluation of proposals was in accordance with established evaluation criteria and was based on reasoned judgment of SEB, protest based upon offeror's disagreement with evaluation is denied because determination of relative merits of proposals is responsibility of contracting agency and will not be disturbed unless shown to be arbitrary or contrary to statute or regulations.
4. Contention that SEB violated DOT Orders by failing to provide protester opportunity to rebut unfavorable general agency experiences is incorrect, since Order merely gives offeror opportunity to rebut its own poor performance record.

This involves a protest by Dollar Rent-A-Car Systems, Inc. (Dollar), against the award of a contract for an off-airport "economy" type rent-a-car service for Washington National Airport to the Vialease Corporation, d/b/a/ Airways Rent-A-Car (Vialease), under request for proposals (RFP) No. DOT-FA-NA-75-1, issued by the Department of Transportation, Federal Aviation Administration (FAA), Washington, D.C.

Dollar received notice of the award to Vialease on September 2, 1975, and on September 5, 1975, Dollar filed a timely protest of the award with the FAA. Knowing that performance of the contract was scheduled to commence on November 1, 1975, Dollar, on October 31, 1975, sued the FAA in the United States District Court for the District of Columbia, praying for a preliminary injunction and a declaratory judgment or a temporary restraining order to stay performance of the contract. The motion for a temporary restraining order was denied on October 31, 1975, and the motion for a preliminary injunction was denied on December 5, 1975. Meanwhile, on November 1, 1975, Vialease began performance of the contract. On December 23, 1975, the FAA issued a formal decision denying Dollar's protest. Within 10 days of this formal adverse decision, on December 31, 1975, Dollar filed a protest with our Office. On January 5, 1976, the district court dismissed Dollar's suit without prejudice.

Citing section 20.2(a) of the GAO Bid Protest Procedures, 4 C.F.R. part 20 (1976), which provides that if a protest has been filed initially with the contracting agency, any subsequent protest to our Office must be made within 10 working days of formal notification of or constructive knowledge of initial adverse agency action to be eligible for GAO consideration, the FAA asserts that Dollar's protest to our Office is untimely.

The FAA argues that the "initial adverse agency action" contemplated by section 20.2(a) was the November 1 commencement of performance of the disputed contract, of which Dollar was aware. This argument lacks merit. The determination for the contract to commence on November 1, 1975, had been made by FAA before Dollar protested on September 5, 1975. Thus, in this case, the "adverse agency action" triggering the 10-day period in which Dollar could protest to our Office occurred on December 23, 1975, when the FAA issued its formal decision adverse to Dollar. Thus Dollar's protest to our Office was timely. See 52 Comp. Gen. 20, 22 (1972), in which "notification of adverse agency action" was identified as receipt of the agency's letter formally denying the protest.

Pursuant to section 20.2 of the Bid Protest Procedures, Dollar diligently sought resolution of its complaint with the contracting agency. Having received no formal decision from the FAA, Dollar

telephoned the agency on October 30. Dollar states that an FAA official "indicated that while no formal decision had yet been reached, performance on the referenced contract was scheduled to commence on November 1, 1975." Thereupon Dollar went into court seeking an injunction to stay performance pending resolution of the protest. Unlike 52 Comp. Gen. 792 (1973), in which a protest to our Office was held untimely because it was filed 3 months after a timely protest to a contracting agency which completely ignored the protest while actively supporting substantial performance of the disputed contract, in this case the intervening commencement of performance cannot be identified as the "initial adverse agency action." Here the protester vigorously pursued its complaint with the agency and in the court. Further, there was no substantial contract performance when the protest was filed in our Office.

The RFP was issued on April 25, 1975, as a negotiated procurement with the closing date for receipt of initial proposals scheduled for June 9, 1975. Dollar's request to submit an incomplete proposal on June 9 was granted. The missing data, concerning Dollar's management and facilities, was to be supplied at a subsequent time. On July 2, 1975, Dollar met with the Source Evaluation Board (SEB) to discuss and clarify its proposal. Dollar was asked to submit missing information pertaining to its proposed management and facility location at the July 2 conference and by letter of July 8, 1975. On July 15, 1975, Dollar submitted its best and final offer containing proposals as to its management and facilities. A contract was awarded to Vialease on August 26, 1975.

The RFP solicited a 5-year contract for an off-airport rent-a-car concession at Washington National Airport. The evaluation criteria listed in the RFP included revenue to the Government, experience of the proponent in car rental management, proximity and adequacy of off-airport facilities, nature of the vehicles to be utilized in the concession, plan of operation, reasonableness of proposed prices and charges, extent of customer services offered, financial ability to perform, and minority representation in hiring. The SEB report indicated that Dollar was downgraded for uncertainties in its facilities and management proposals, in addition to its lack of owner-operator management. Dollar contests this SEB evaluation.

Counsel for Dollar contends that the SEB, contrary to the Federal Procurement Regulations (FPR) and Department of Transportation (DOT) Orders, improperly and unfairly downgraded Dollar management and site proposals without giving Dollar an opportunity to clarify or rebut its weaknesses. Furthermore, Dollar contests SEB evaluations preferring locally owned management and a site whose lease would expire before completion of the contract, but had not yet been renewed.

The FAA responds that although the FPR does not apply to concessions at Washington National Airport, it has complied with its own DOT and FAA Orders and the FPR. It defends the SEB grading as a rational evaluation of the available data.

Counsel maintains that the SEB, having perceived "uncertainties" in Dollar's facility location proposal after the cutoff date for best and final proposals, failed to meet its "responsibility to undertake further exploration so that Dollar's proposal would be 'fully understood.'" It is argued that the SEB violated DOT Order 4200.11F6 which requires that after the preliminary review of proposals, evaluating teams identify and attempt to clarify ambiguities in the proposals. The FAA has replied that section F6 is inapplicable here, as it pertains only to those solicitations where teams are used to make a preliminary evaluation.

Similarly, counsel alleges violation of FPR § 1-3.805-1(a)(5) (1964 ed. amend. 153), which provides that after receipt of initial proposals, written or oral discussions need not be conducted with responsible offerors when it can be clearly shown that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price, provided that "In any case where there is uncertainty as to \* \* \* technical aspects of any proposals, the contracting officer shall not make award without further exploration and discussion prior to award."

It is clear from the record that on July 2 and July 8, 1975, the SEB identified the areas that needed clarification in Dollar's proposal. It is well-settled that the offeror must affirmatively demonstrate the merits of its proposal, or run the risk of proposal rejection, and where an offeror submits a revised proposal in response to a call for best and final offers, the contracting officer need

B-185629

not reopen negotiations and may reject a proposal if revisions render the proposal unacceptable. See Electronic Communications, Inc., B-183677, January 9, 1976, 76-1 CPD 15; General Exhibits, Inc., B-182669, March 10, 1975, 75-1 CPD 143; American Maintenance and Management Services, Inc., B-179126, February 12, 1974, 74-1 CPD 64. Thus, we are unable to conclude that the above-cited section of FPR was violated and it is unnecessary to decide the issue of whether the FPR applies to concessions at Washington National Airport.

Counsel also challenges the downgrading of Dollar's site and plan of operation proposals relative to Vialease, whose lease was scheduled to expire during performance of the contract. The SEB report indicates that Dollar's best and final offer showed no lease option, merely a letter of July 9, 1975, from the owner of Dollar's proposed site promising to set aside a portion of his land for Dollar's facility. The SEB found the certainty of this property arrangement dubious, especially since the FAA had received a similar letter on July 10, 1975, from the same landowner offering the FAA immediate rental of the same property. Additionally, the SEB report states that Dollar's proposed site was handicapped by a narrow 30-foot access easement which crossed through a competitor's off-airport rental car facility and would be shared with other possible lessees of the balance of the land, whose use of the property could not be determined to be compatible with Dollar's planned use. The source selection official (SSO) explained the higher rating given Vialease, stating:

"\* \* \*[E]ven though \* \* \*[Vialease] did not have a written option to renew its lease \* \* \*, the fact that they were currently operating from a definite site, plus the fact that they could lease additional land from the airport enabled me to give greater weight to their site location and plan of operation. Based on this, I was satisfied that \* \* \* [Vialease] would be able to maintain a suitable off-airport location in the same general area from which they now operate."

Counsel also objects that the SEB unfairly downgraded Dollar's experience and proposed management in the car rental business because Dollar proposed management by a company employee rather than owner-operator management. The SEB's report explains:

"From past experience we have found that these employee-managers have a high turnover rate, with the real decision-making authority resting in the home offices. We have found that 'absentee' management is not as responsive to the airport as local management."

In resolving cases in which a protester challenges the validity of an agency evaluation, it is not the function of this Office to evaluate proposals in order to determine which should have been selected for award. The determination of the relative merits of proposals is the responsibility of the contracting agency, since it must bear the burden of any difficulties incurred by reason of a defective evaluation. Thus, it is the position of this Office that procuring officials enjoy a reasonable degree of discretion in the evaluation of proposals and that such determinations are entitled to great weight and must not be disturbed unless shown to be arbitrary or in violation of the procurement statutes and regulations. See Houston Films, Inc., B-184402, December 22, 1975, 75-2 CPD 404; Donald N. Humphries & Associates, et al., 55 Comp. Gen. 432 (1975), 75-2 CPD 275, and the cases cited therein.

The FAA has documented the findings upon which the challenged evaluation ratings are based. We have reviewed this record in light of Dollar's allegations and see nothing in the record which indicates that the evaluation was improper or unfair or that the SEB was arbitrary in rating the proposals as it did. To the contrary, it appears that the SEB evaluated the proposals on the basis of the reasoned judgment of its members and in accordance with the established evaluation criteria. The fact that the protester does not agree with that judgment does not invalidate it. See Honeywell, Inc., B-181170, August 8, 1974, 74-2 CPD 87; Houston Films, Inc., supra.

Finally, counsel argues that the SEB wrongfully failed to provide Dollar an opportunity to rebut the FAA's past experiences giving rise to a policy preferring local owner-operator type management over employee management. It cites DOT Order 4200.11G3b(2) which requires that:

B-185629

"No company shall be downgraded in an evaluation as a result of unfavorable experience data without first having been afforded an opportunity to explain the unfavorable data as well as any corrective action it may have taken to cure the deficiency noted. \* \* \*"

A reading of this section in its entirety shows that the opportunity for rebuttal pertains only to those offerors who have poor past performance records. Section G3b, Experience Data, begins:

"(1) A contractor's past performance can indicate how he may be expected to perform if awarded a contract. When available, information in the form of pre-award surveys, facility capability reports \* \* \*, and any additional reports which bear on a concern's capability shall be utilized by the SEB."  
(DOT Order 4200.11G3b(1))

Thus, the SEB's failure to afford Dollar an opportunity to rebut FAA policy concerning rental car management based on the agency's general experiences was not a violation of DOT Orders.

For the foregoing reasons, the protest is denied.

*R. F. Kistner*  
Deputy Comptroller General  
of the United States